APPEAL NO. 021131
FILED JUNE 10, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on April 18, 2002, to consider the issue of the appellant/cross-respondent's (claimant) impairment rating (IR), the hearing officer found that designated doctor's report, which assigned a 12% IR, was "incomplete" in that it lacked sufficient range of motion (ROM) ratings for the claimant's cervical and lumbar spinal region injuries and, thus, was not entitled to presumptive weight. The hearing officer concluded that the claimant's correct IR is not yet ripe for adjudication and he ordered that the claimant be returned to the designated doctor to obtain recorded measurements of any ROM loss as a result of the compensable injury. The claimant has appealed, contending that the hearing officer should have adopted the 21% IR assigned by the claimant's treating doctor. The carrier filed a timely response and appeal, contending that the hearing officer's findings concerning the incompleteness of the designated doctor's report are based on lay evidence and are against the great weight of the evidence. The carrier seeks reversal and an adoption by the Texas Workers' Compensation Commission (Commission) of the designated doctor's 12% IR. The file does not contain a response from the claimant to the carrier's appeal.

DECISION

Reversed and remanded.

The claimant, who received cervical and lumbar spine injuries when he was thrown off a tractor on _____, testified that the designated doctor used a six inch ruler to measure his kneecaps during the impairment evaluation on March 29, 2001, but used no instrument to measure his cervical and lumbar spine ROM. The claimant's wife, who said she was present throughout the designated doctor's examination, testified to the same effect. The designated doctor's detailed narrative report of May 7, 2001, which accompanied his Report of Medical Evaluation (TWCC-69) assigning a 12% IR, makes no mention of spinal ROM measurements being taken, let alone whether an inclinometer or goniometer was used, nor is the report accompanied by Figure 83a (Cervical ROM) and Figure 83c (Lumbar ROM) charts from the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, or any other recording of spinal ROM measurements. The report simply states that "the examinee had decreased ranges of motion most likely secondary to voluntary restrictions." The designated doctor's correspondence of November 8, 2001, responding to the request for clarification of November 6, 2001, repeats the observation that the decreased spinal ROM "were most likely secondary to voluntary restrictions" but adds that the lumbar and cervical ROM were measured with dual inclinometers.

The hearing officer's discussion of the evidence reflects the various reasons, including the lay testimony of the claimant and his wife, why he apparently did not find credible the designated doctor's November 8, 2001, statement that he measured the

claimant's cervical and lumbar spine ROM using the dual inclinometer method. Section 408.125(e) provides, in part, that the report of the Commission-selected designated doctor shall have presumptive weight and the Commission shall base the IR on such report "unless the great weight of the other **medical** evidence is to the contrary [emphasis supplied]" and it is well-settled that "medical evidence, and not lay testimony, is required to overcome the report of a designated doctor." Texas Workers' Compensation Commission Appeal No. 950548, decided May 16, 1995. Further, the Appeals Panel has emphasized that the great weight of the other medical evidence requires more than a mere balancing or preponderance of the evidence (Texas Workers' Compensation Commission Appeal No. 93539, decided March 25, 1994); that no other doctor's report, including that of the treating doctor, is accorded this special presumptive status (Texas Workers' Compensation Commission Appeal No. 93932, decided November 29, 1993); and that the designated doctor's report should not be rejected absent a substantial basis for doing so (Texas Workers' Compensation Commission Appeal No. 94075, decided February 28, 1994).

It is apparent from the hearing officer's discussion of the evidence that he did not apply Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)), effective January 2, 2002, to the designated doctor's November 8, 2001, report. This rule provides, in part, that "[t]he designated doctor shall respond to any commission requests for clarification not later than the fifth working day after the date on which the doctor receives the commission's request" and that "**[t]he doctor's response is considered to have presumptive weight as it is part of the doctor's opinion** [emphasis supplied]." In Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002, the Appeals Panel, determining that this rule should be given immediate effect, reversed and remanded for the hearing officer to consider the amended report of the designated doctor and give it the presumptive weight required by Rule 130.6(i). Following this precedent, we reverse the hearing officer's decision and order and remand for the hearing officer to determine whether the great weight of the other medical evidence is contrary to the designated doctor's report in view of the designated doctor's report of November 8, 2001, which, itself, is entitled to presumptive weight under Rule 130.6(i). After further consideration, the hearing officer should make such further findings of fact and conclusions of law as are appropriate, considering the application of Rule 130.6(i) and our decision in Appeal No. 013042-s.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **(a self-Insured governmental entity)** and the name and address of its registered agent for service of process is

CITY MANAGER
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Michael B. McShane
Appeals Judge